Filed 5/18/10 P. v. Vaughn CA1/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. MICHAEL RAY VAUGHN and CHRISTOPHER VAUGHN, Defendants and Appellants.	A122970 (Alameda County Super. Ct. No. C150814)

Michael Ray Vaughn and Christopher Vaughn[1] appeal from convictions of various sex offenses. Michael contends that the court erred in imposing a full-term consecutive sentence for a count of sodomy, and that he received ineffective assistance of counsel at sentencing. Christopher contends the evidence was insufficient to support one of his convictions. We affirm.

STATEMENT OF THE CASE

Michael was charged by a second amended and consolidated information filed on April 7, 2008, with four counts of continuous sexual abuse (Pen. Code, § 288.5, subd. (a))[2], committed against Jane Doe 1 between October 16, 1997 and October 15, 2003 (count 1), Jane Doe 2 between February 21, 1996 and February 20, 2002 (count 3),

[1] As appellants share the same last name, for convenience, this opinion will refer to each by his first name. No disrespect is intended.

[2] All statutory references are to the Penal Code unless otherwise indicated.

Jane Doe 3 between February 12, 1995 and February 11, 1999 (count 4) and Jane Doe 4 between May 19, 1988 and May 18, 1997 (count 6); one count of aggravated sexual assault of a child (rape) between December 1, 1994 and February 20, 1996 (§§ 269, subd. (a)(1), 261, subd. (a)(2)) involving Jane Doe 2 (count 2); and one count of sodomy with a person under 14 years of age between July 16, 1996 and July 15, 1998 (§ 286, subd. (c)(1)) involving John Doe 1 (count 5).

The second amended and consolidated information also charged Christopher with two counts of aggravated sexual assault of a child involving Jane Doe 1 (rape and oral copulation) between October 16, 2001 and October 15, 2003 (§§ 269, subd. (a)(1), 261, subd. (a)(2)) (count 7), 288a (count 8)) and one count of continuous sexual abuse of Jane Doe 4 between May 19, 1991 and May 18, 1993 (§ 288.5, subd. (a)) (count 9).[3]

The information further alleged that Michael had suffered a prior felony conviction for which he served a prison term, and that Christopher had suffered two prior convictions for which he served separate prison terms. (§ 667.5, subd. (b).)

On May 23, 2008, a jury found appellants guilty as charged. The prosecution did not proceed on the prior conviction allegations, which previously had been bifurcated.

On October 3, 2008, Michael was sentenced to a prison term of 15 years to life for the aggravated sexual assault, plus consecutive upper terms of 16 years for each of the four counts of continuous sexual abuse and eight years for the count of sodomy. Christopher was sentenced to a prison term of 30 years to life for the two counts of aggravated sexual assault, plus a consecutive upper term of 16 years for the count of continuous sexual abuse.

Appellants filed timely notices of appeal on October 3, 2008.

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[3] The information also charged Russell Vaughn with three counts of sodomy with a person under age 14, involving John Doe 1 (§ 286, subd. (c)(1)) (counts 10, 11 and 12). Russell Vaughn was not tried in this proceeding and is not involved in the present appeal.

STATEMENT OF FACTS

Jane Doe 1, Jane Doe 2, Jane Doe 3, Jane Doe 4, Diana, and John Doe are siblings. At the time of trial, Jane Doe 4 was 24 years old, Diana was 22, Jane Doe 3 was 21, Jane Doe 2 was 20, John Doe 1 was 16, and Jane Doe 1 was 15. Christopher and Michael Vaughn were 40 years old and 38 years old, respectively.

The Doe siblings were removed from their parents' custody when the eldest was about 10 years old, and lived in Oakland with their aunt, Nancy C., and her children, Christopher, Michael, Russell, Simmy and Missy. It appears that at some times they all lived in one residence and at other times some of the Doe siblings lived with Michael in an apartment upstairs from Nancy C.'s apartment. All of Nancy c.'s children are older than the Doe siblings. Michael did much of the disciplining of the Doe siblings, and would "whoop" them with a wooden paddle or a branch from a tree, or yell at them. Christopher also hit and yelled at the siblings.

Jane Doe 4 testified that when she was still living with her parents, they would go to Nancy C.'s house for food when they did not have their own. When she was five or six years old, Michael took off her clothes and put his penis into her vagina. This would happen "all the time" when they went to Nancy C.'s house for food toward the end of each month. When the siblings moved in with Nancy C., Michael continued to do this "[m]ostly all the time," until Jane Doe 4 turned 13 and stopped letting him touch her.

Jane Doe 4 discovered she was pregnant when she was 11 years old, when Michael woke her, took her into his room, unclothed her, touched her stomach and told her she was pregnant. He put a book on her stomach and put his knee on the book, putting pressure on it "so that he could, I guess, kill it." He then put his penis in her vagina. The next day, he took her to a clinic for an abortion, but the pregnancy was too far advanced. Dr. Jill McGill examined Jane Doe 4 on May 8, 1995, for a possible complication in her pregnancy. When McGill asked Jane Doe 4 to open her legs for a pelvic examination, the girl "became suddenly completely flaccid, and she just dropped

her legs apart and she just dropped her arms and turned her head and stared off into space." Whereas "[v]irtually every woman at least flinches a little bit" at the outset of a pelvic exam, Jane Doe 4 "did absolutely nothing." The doctor "almost threw up" because she was "so horrified that an 11 year old could tolerate an exam from a stranger in such a bland fashion." It was a reaction McGill understood to be associated with continuous sexual abuse.

Jane Doe 4 gave birth to a daughter who was adopted by an aunt in Mississippi. Jane Doe 4 testified that she knew Michael was the father because of DNA testing, and that she was not having sex with anyone other than Michael nine months before the baby was born. She lied to the police and social workers, however, telling them the father was "Jose," a name Michael made up. Michael told her to lie because if she told the truth she would be separated from her sisters. Michael continued to put his penis in her vagina during and after her pregnancy.

Jane Doe 4 testified that Christopher also put his penis into her vagina "[o]nce or twice," and on another occasion "far apart" he put his finger in her vagina. The digital penetration happened first and the sexual intercourse was "months" after. She did not really remember how many months passed between the digital penetration and the intercourse, but it was probably more than one and less than three. The times Christopher had intercourse with her could have been about a month apart.

DNA testing resulted in a conclusion that Michael was "included" as Jane Doe 4's baby's father and that Christopher was "excluded." There was nothing in the genetic profile inconsistent with Michael being the father.

Diana Doe testified that from around the time she and her siblings came to live with Nancy C., when she was going into first grade, until she was about 15 years old, Michael would put his penis in her vagina "frequently." He also put his penis in her "butt" and in her mouth, each "a couple of times." Christopher put his penis in Diana's vagina more than three times.

Jane Doe 3 testified that when she was in sixth grade, Michael came into her room, pulled her pants down, and put his penis in her vagina. He told her to be quiet and not to tell anyone. Michael did this to her on more than three, but less than 10 occasions. Before the first time, Jane Doe 3 had seen Michael on top of Jane Doe 4, having sex with her. One night she saw Christopher in the bedroom she shared with her sisters, trying to grab Diana. Jane Doe 3 woke Missy, who had Jane Doe 3 and Diana sleep in her room the rest of the night. Jane Doe 3 once called the police and told them what was happening, but Jane Doe 4 told her they would be separated and, when the police arrived, Jane Doe 3 told them what she had said was not true.

Jane Doe 2 testified that when she was about five years old, one night while everyone else was asleep, Michael took her into his room, took off her pajamas and put his penis in her vagina. She cried and he told her to be quiet. Michael continued to do this about three or four times a month until she was 13 or 14 years old; she would cry and he would yell at her. He also put his penis in her "butt" "a lot," and put his penis in her mouth.

One night, when Jane Doe 2 was sharing a bed with Jane Doe 4, and their sisters Jane Doe 3 and Diana were in the other bed in the room, Jane Doe 2 was awakened by the bed moving and saw Michael on top of Jane Doe 4, having sex with her. Jane Doe 2 never told anyone what she saw because she was afraid of Michael: She was scared because of the "whooping," and Michael had told her that if she told what was happening, she and her sisters would never see each other again. Another night, when Jane Doe 2 was in her teens, she was sleeping on the floor in Nancy C.'s room and awoke to hear Diana crying and saying "[g]et off me" to Christopher, who had Diana on the bed. Diana had been on the floor with Jane Doe 2 and Jane Doe 3 when they went to sleep. Jane Doe 2 did not recall where Nancy C. was, but she was not present. Jane Doe 2 and Jane Doe 3 ran to Missy's room, and Missy had the three sisters in her room. Jane Doe 2 tried to tell Nancy C. what has happening, but she did not say or do anything about it.

In 2005, when Jane Doe 1 told her sisters that Michael had been "messing with her," they told Diane Williams, at the Native American Health Center, about the abuse and Williams called the police. Jane Doe 2 was separated from her sisters and put in a foster home.

John Doe 1 testified that one night when he was seven or eight years old, Michael woke him up and told him to come into the living room, where Michael pulled down his pants, put his penis in John's mouth and made him suck it. Michael pulled down John's pants and told him to lie down on some covers that were spread on the floor, then poured something liquid between John's legs by his "butt" and put his penis into John's butt. John did not tell anyone what had happened because Michael and his sisters used to call him gay "to play around," and he figured if he told his sisters about the incident they would really think he was gay. One morning when he was about 11 or 12 years old, John saw Michael on top of Diana, who was face down, having sex with her from behind.

At the time of trial, Jane Doe 1 was 15 years old and in eighth grade, taking "special classes." She testified that when she was five or six years old, Michael told her to come into his room, where he told her to take off her pants, took off his own, and put his penis in her vagina. She was screaming and he put his hand over her mouth. Michael continued to do this to her "[e]very day" until she was 11 years old, except for a year when she was eight or nine years old when she went to Mississippi with Nancy C. and Russell. He would also put his penis in her anus and in her mouth "[e]very day."

Also when she was five or six years old, Christopher called Jane Doe 1 into Nancy C.'s room, where he told her to take off her pants and then put his penis in her vagina. She screamed and he covered her mouth. Christopher did this to her about once a week until she was 11 years old, except for the year she was in Mississippi. Christopher also put his penis in her mouth on more than two occasions.

Jane Doe 1 finally told Jane Doe 2 and Diana about the abuse when they were about to go out and she did not want to be left alone at Michael's house. They went to

one of the sisters' boyfriend's house and called the police. When Nancy C. came to the police station and Jane Doe 1 told her Michael had been raping her, Nancy C. asked why she was lying. Jane Doe 1 lived with Nancy C. for a "little while" before she was taken to foster care, and during this time Michael continued his sexual conduct with her.

Oakland Police Officer Doria Passalacqua took Jane Doe 1's report of sexual abuse on January 22, 2005. Jane Doe 1 appeared to have a cognitive or developmental delay, and Passalacqua saw an indication of fetal alcohol syndrome, a condition which could affect her memory, depending on the severity of the condition. The officer was "[a]bsolutely" able to understand Jane Doe 1's report.

Dr. James Crawford, an expert in pediatric medical evaluation of sexual abuse, testified that an examination of Jane Doe 1 on May 31, 2005, revealed deep notches in her hymen, a condition consistent with forced sexual intercourse. Crawford stated that the notching was not determinative, in that "[a] very small percentage of nonsexually active adolescents can have areas of narrowings like this, but it is more commonly seen in sexual activity."

Social worker Miriam Wolf, testified as an expert on Child Sexual Abuse Accommodation Syndrome, a pattern of behavior seen in sexually abused children including secrecy, helplessness, entrapment and accommodation, delayed, hesitant or unconvincing disclosure and retraction. Wolf testified that, depending on the totality of the circumstances, including the age and stage of the child, a child reporting having been abused "every day" might actually mean that it happened a lot.

Defense

Melissa Vaughn (Missy), appellants' younger sister, testified that after their mother became the guardian for the Doe children, all the Vaughn siblings took care of them. She considered her family kind and caring, and her brothers were always caring with the children. Melissa never saw Michael or Christopher discipline any of the children and they were never hit with a paddle, extension cords, hangers or switches;

punishment would be things like no television or no going outside. Michael coached the children in basketball. Melissa never saw Michael do anything of a sexual nature to any of the children. The whole family would participate in activities such as attending Native American pow-wows, playing baseball, having barbecues and going to the beach. Melissa did not know Jane Doe 4 was pregnant until she gave birth because she wore baggie clothes. She did not believe Michael was the father of Jane Doe 4's baby and believed the DNA had been "tampered with." Jane Doe 4 never told her who the father was, but from other family members Melissa understood that the father was someone living outside their home.

Bertha Nevarez, who was trained to conduct forensic interviews of children and developmentally-delayed adults, interviewed Jane Doe 1 on May 12, 2005. Jane Doe 1 was "very upset and very withdrawn" and appeared developmentally younger than 12 years old. She said she had lived in Mississippi from age six years to 11 years. In an interview on June 1, 2005, John Doe discussed alleged child sexual abuse with Nevarez and named some adults who had "done some things to him," but did not mention Michael.

DISCUSSION

I.

As indicated above, in addition to the indeterminate term of 15 years to life for the aggravated sexual assault conviction, Michael was sentenced under the authority of section 667.6 to full, separate and consecutive upper term sentences for each of the four counts of continuous sexual abuse and for the count of sodomy. Michael contends imposition of the full consecutive upper term sentence for the sodomy conviction was unauthorized because section 667.6 does not apply to this offense and, therefore, the court was limited to imposing a sentence of one-third of the middle term on this count.

Section 667.6 provides an alternative, harsher sentencing scheme for certain sex offenses than the generally applicable sentencing provisions of section 1170.1. (*People*

v. Belmontes (1983) 34 Cal.3d 335, 344, 346.) Under section 1170.1, the court imposes an aggregate sentence composed of a principal term, the greatest term of imprisonment imposed for any of the convictions, and subordinate terms for additional felony offenses consisting of one-third of the middle term for each. (§ 1170.1, subd. (a); *People v. Pelayo* (1999) 69 Cal.App.4th 115, 123 (*Pelayo*).) Under section 667.6, subdivision (c), however, "[i]n lieu of the term provided in Section 1170.1, a full, separate, and consecutive term may be imposed for each violation of an offense specified in subdivision (e) if the crimes involve the same victim on the same occasion." Subdivision (e) of section 667.6 lists a number of offenses "commonly referred to as 'violent sex crimes.' " (*Pelayo*, at p. 123.) Subdivision (d) of section 667.6 makes imposition of full, separate and consecutive terms for the enumerated offenses mandatory when the crimes involve separate victims or the same victim on separate occasions.

At the time Michael committed his offense, section 667.6 specified two types of sodomy as coming within its reach, "sodomy in violation of subdivision (k) of Section 286" [sodomy by a public official against the victim's will] and "sodomy . . . in violation of Section 286 . . . by force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person." (Stats. 1994, ch. 1188, § 7 (SB 59).)[4] Michael, however, was charged with and convicted of sodomy under section 286, subdivision (c)(1), which, as the jury was instructed, is sodomy "with a person who was under the age of 14 years and at least 10 years younger than defendant."

Respondent agrees that sodomy under section 286, subdivision (c)(1), was and is not an offense enumerated in section 667.6. Nevertheless, respondent argues the

[4] Section 667.6 currently applies to sodomy **"**accomplished against the victim's will by means of force, violence, duress, menace, or fear of immediate and unlawful bodily injury on the victim or another person," "by threatening to retaliate in the future against the victim or any other person," by either of these means when the perpetrator acts in concert with another person, or by a public official against the victim's will. (§ 286, subds. (c)(2), (c)(3), (d), (k).)

sentence should stand because Michael forfeited the issue by failing to object at sentencing and because the trial court could have imposed the same sentence by designating the sodomy as the principal term under sections 1170 and 1170.1, and then imposing full consecutive terms under section 667.6 for the continuous sexual abuse counts.

With respect to the failure to object, Michael maintains no objection was required because the sentence was unauthorized, a "narrow exception to the general requirement that only those claims properly raised and preserved by the parties are reviewable on appeal." (*People v. Scott* (1994) 9 Cal.4th 331, 354.) "[A] sentence is generally 'unauthorized' where it could not lawfully be imposed under any circumstance in the particular case." (*Ibid.*) By contrast, "claims deemed waived on appeal involve sentences which, though otherwise permitted by law, were imposed in a procedurally or factually flawed manner." (*Ibid.*)

As will be explained, although appellant is correct that the trial court could not impose a full consecutive sentence on the sodomy count under section 667.6, a sentence of the length the court imposed was within the court's authority. Indeed, if the sentence can be viewed as unauthorized, it is not in the manner appellant suggests: His claim that the court was required to impose a one-third middle term for this count is erroneous and, in fact, the court could not have imposed such a subordinate term for the sodomy.

In order to impose a one-third middle term sentence for the sodomy count, as appellant suggests, the court necessarily would have had to treat one of the other offenses as the principal term. This is not permissible. (*Pelayo*, *supra*, 69 Cal.App.4th at p. 123 [court erred in using violent sex offense sentenced under section 667.6 as principal term].) The term imposed under section 667.6 "shall not be included in any determination pursuant to Section 1170.1." (§ 667.6, subd. (c).) "Thus, when a defendant is convicted of both violent sex offenses and crimes to which section 1170.1 applies, the sentences for the violent sex offenses must be calculated separately and then

added to the terms for the other offenses as calculated under section 1170.1." (*Pelayo*, at p. 124.) Counts sentenced under section 667.6 "may not be used as components of a term calculated under section 1170.1, either as a principal term or as a subordinate term." (*Id.* at p. 125.)

Here, the trial court expressly stated that it was exercising its discretion to impose full consecutive terms on each of the offenses other than the aggravated sexual assault, which carried an indeterminate term.[5] Neither the prosecution nor the probation department alerted the court that the sodomy offense of which Michael was convicted was not an offense enumerated in section 667.6, and the court obviously believed that it was. Accordingly, sentence on the sodomy count had to be imposed under section 1170. Since this was the only count to be sentenced under section 1170, the court was required to impose a full term sentence, not a subordinate one-third of the middle term.

The only possible question for the court's discretion was whether to impose a lower, middle or upper term on the sodomy count. But, on this record, there truly is no question what the court would have done if it had realized that the sodomy count had to be sentenced under section 1170 rather than section 667.6. The court, in fact, chose the upper term for this offense under section 667.6, which, while providing for full and consecutive terms for the offenses to which it applies, leaves selection among the three potential terms for each offense to the court's discretion. The probation report and letter

[5] The trial court's finding that Michael "committed multiple sex acts against different victims and against the same victim on separate occasions" appears to address the mandatory provision of section 667.6, subdivision (d), and the district attorney's letter to the probation department, submitted to the court with the probation report, indicated that full consecutive terms were required by section 667, subdivision (d), because there were multiple victims and offenses against the same victim at separate times. While this is the case under the current statute, at the time Michael committed these offenses, continuous child abuse under section 288.5 was enumerated as an offense under section 667.6, subdivision (c), but not under section 667.6, subdivision (d). Thus, only the discretionary provisions of section 667.6 applied in this case, not the mandatory ones. The issue is of no consequence as the trial court in fact exercised its discretion.

from the prosecutor to the probation department described multiple factors in aggravation and none in mitigation, and the court could not have made more clear its intention to sentence Michael "to the fullest extent of the law." The court stated its reasons for imposing full, separate and consecutive sentences, as follows: "The crimes herein involve continuous sexual abuse with a high degree of viciousness. Defendant raped, sodomized, and forced oral copulation upon his young cousins, victims as young as five years old. In fact, Jane Doe 4 was impregnated by the defendant when she was 11 years old and gave birth to the defendant's child at age 12. The victims were particularly vulnerable in that they were extremely young and dependent upon Michael Vaughn's household for food and shelter. The matter [*sic*] in which these crimes were carried out indicates planning, sophistication and professionalism. The defendant took advantage of a position of trust or confidence to commit these offenses. He was the adult cousin to all these victims and he was placed in the position of being their guardian after they were already traumatized and separated from their parents. The defendant engaged in violent conduct which indicates a serious danger to society. He not only sexually molested these victims, but he also sexually assaulted them with various items, including paddles, switches, et cetera. The defendant has already served a prison term and he was on parole during the time of which some of these crimes were committed. He has not satisfactorily performed on probation previously having suffered these new arrests for all these offenses, as well as the revocation. These crimes were committed against numerous different victims. At least four of the victims were sexually assaulted over a substantial period of time, which clearly gave Mr. Michael Vaughn enough opportunity to reflect on his actions, and he should serve consecutive sentences for the rape, the sodomy, and the forced copulation of each of the victims. [¶] . . . [¶] . . . It is noted that each of these defendants has expressed no remorse, each have not expressed any compassion, and each of them did not provide a statement to the probation officer as was their right and opportunity to do. Rather they merely say they weren't treated fairly. Each of these

defendants have a history of violence and illegal sexual conduct with minors. . . . And each of these defendants' attitudes towards these victims' physical and psychological trauma is, at best, callous, as they failed to verbalize or express any remorse during the investigation interview, and their demeanor has been one of contriteness. For these reasons the Court believes and finds that each of these defendants must be punished to the fullest extent of the law."

The record leaves no doubt that if the trial court had been aware that section 667.6 did not apply to the sodomy, it would have imposed an upper term sentence of eight years on this count under section 1170. Adding to this the properly imposed full and consecutive sentences on the four other determinate term offenses, the total length of Michael's determinate term sentence would have been 72 years, precisely the same length as the court imposed in the mistaken belief that section 667.6 applied to all the determinate term offenses.

Michael's contention that the judgment should be corrected to reflect a one-third of the middle term sentence on count 5 is without basis and must be rejected.

II.

Michael also contends he was denied his right to effective assistance of counsel at sentencing based on his attorney's failure to object when the court imposed sentence on count 5 under section 667.6, and failure to inform the court that, contrary to the prosecutor's letter to the probation department, mandatory sentencing under section 667.6 did not apply to this case. He further claims he received ineffective assistance counsel in that his attorney did not advocate on his behalf regarding his desire to address the court before sentence was imposed.

" '[I]n order to demonstrate ineffective assistance of counsel, a defendant must first show counsel's performance was "deficient" because his "representation fell below an objective standard of reasonableness . . . under prevailing professional norms." (*Strickland v. Washington* (1984) 466 U.S. 668, 687-688; [*People v.*] *Ledesma* [(1987)]

43 Cal.3d 171, 215-216.) Second, he must also show prejudice flowing from counsel's performance or lack thereof. (*Strickland, supra,* at pp. 691-692; *Ledesma, supra,* at pp. 217-218.) Prejudice is shown when there is a "reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." (*In re Sixto* (1989) 48 Cal.3d 1247, 1257; *Strickland, supra,* at p. 694.)' (*People v. Jennings* (1991) 53 Cal.3d 334, 357.)" (*In re Avena* (1996) 12 Cal.4th 694, 721.)

Michael's claims based on his attorney's failure to object to the trial court's application of section 667.6 are meritless. As can be seen from our discussion in the preceding section of this opinion, Michael's contention that his attorney should have objected to the court's imposition of sentence on count 5 is based on a misconception of sentencing principles: While the court was mistaken in believing section 667.6 applied to Michael's sodomy offense, as described above, Michael is mistaken in believing that the court could have imposed less than a full term sentence on this count. Had counsel objected, there is no reasonable probability the court would have imposed a shorter sentence. Similarly, the inapplicability of section 667.6, subdivision (d), to the counts of continuous sexual abuse (see, *ante*, fn. 5, p. 11) is of no practical consequence because the trial court expressly and at length exercised its discretion in choosing to impose sentence under section 667, as it was authorized to do by section 667.6, subdivision (c). Even if Attorney Billups's performance was deficient in these regards, Michael suffered no prejudice.

Michael's complaint regarding his desire to address the court requires some background. At the outset of the sentencing hearing, the court noted that Attorney Darryl Billups had been appointed to represent Michael because his trial counsel, Les Chettle, had been hospitalized for several months. Billups had represented Michael at the

preliminary hearing in August 2005, but Michael was thereafter represented by Chettle through the trial.

After the court denied a motion for new trial by Christopher, Billups stated that although he had not tried the case or had access to a transcript, "[o]ut of an abundance of caution we would be making an oral motion for a new trial." The court asked, "But you heard the preliminary hearing transcript, you talked with your client, you reviewed the discovery?" Billups replied in the affirmative and the court denied the motion. He then replied in the negative when the court asked whether there was "anything else" prior to proceeding with sentence and, when asked if Michael waived formal arraignment for judgment and sentence, stated, "So waived."

After the court listed Michael's and Christopher's convictions, it became clear that Billups did not have a copy of the second amended and consolidated information; he was given one and then agreed there was no legal cause why judgment should not be pronounced. Billups stated he had reviewed the probation reports and a letter addressed to the court from Ebony Doe. The court asked whether he had any comments, recommendations or additional evidence bearing on sentencing, and Billups said that he and his client were prepared to submit. No written statement had been submitted to the probation department by counsel for Michael or for Christopher.

The court heard from Jane Doe 1, John Doe 1, Diane Williams and the prosecutor, all of whom spoke harshly against Michael and Christopher, then asked defense counsel if there was anything else. Billups said Michael wanted to address the court and the prosecutor objected, "I believe that he waived that right earlier. He was asked and said no. And at this point I think it is inappropriate." The court asked, "Anything else?" and Billups said, "No, Your Honor." The court asked the prosecutor, "Do you agree that he may address the Court or no?" She replied, "No." Billups indicated he had nothing more and the parties submitted the matter for sentencing.

Michael urges that Billups did absolutely nothing to represent him at sentencing and, therefore, prejudice from this failure of representation must be assumed. He relies on cases involving extreme violations of the right to effective representation. (*United States v. Cronic* (1984) 466 U.S. 648, 659-660 & fn. 25 [discussing as examples of presumed prejudice "complete denial of counsel," "counsel . . . either totally absent, or prevented from assisting the accused during a critical stage of the proceeding," circumstances making it unlikely any attorney could have rendered effective assistance, as where appointment too close to trial to permit preparation]; *Holloway v. Arkansas* (1978) 435 U.S. 475, 489-491 [conflict of interest where counsel required to represent codefendants with conflicting interests]; *Powell v. Alabama* (1932) 287 U.S. 45, 57-58 [attorney first assigned to represent young, illiterate defendants on morning of racially charged capital trial, with no opportunity to investigate].) Michael argues that, as in those cases, damage to his interests must be presumed because it is impossible to know whether an adequately prepared advocate might have "triggered a different response in the sentencing court."

There can be no question that "[a] standard of reasonable competence requires defense counsel to diligently investigate the case and research the law." (*People v. Thimmes* (2006) 138 Cal.App.4th 1207, 1212.) The record does not indicate how long before the sentencing hearing Billups was appointed, but he was not as completely unprepared as Michael portrays him: Although he had not read the trial transcript, he had read the probation report, which included the letter from the prosecutor regarding sentencing, and the letters submitted to the court regarding sentencing. Michael is not complaining that Billups failed to argue more strongly for a new trial or to seek a continuance to investigate whether such a motion, which clearly would depend upon familiarity with the details of the trial, might be appropriate. Michael's complaint is that Billups's representation was deficient in two particular ways (aside from the issues related to section 667.6): that he failed to advocate for Michael's request to address the

court, and that he failed to present mitigating evidence on Michael's behalf. Michael fails to demonstrate that Billups was unprepared with respect to these issues in a way that would justify presuming prejudice.

As described above, Michael asked to address the court only after the court heard from the witnesses against him, Billups having earlier stated that he and Michael waived formal arraignment and had nothing further to submit to the court. The court agreed with the prosecutor's assertion that Michael had waived his right to address the court. Michael now contends Billups should have contested the court's finding of waiver by pointing out that no one had asked Michael whether he wanted to present mitigating testimony and by arguing that Michael's right to offer mitigating evidence was a personal right that could not be waived by counsel. A criminal defendant has a right to "make a *sworn* personal statement in mitigation that is *subject to cross-examination* by the prosecution." (*People v. Evans* (2008) 44 Cal.4th 590, 600.) The right can be forfeited, and the California Supreme Court has declined to decide whether the right is personal to the defendant, like the right to testify at trial (*People v. Robles* (1970) 2 Cal.3d 205), or can be forfeited by defense counsel (*People v. Evans*, at p. 600).

Michael asks us to speculate that if Billups had pushed the point, the trial court would have permitted him take the stand to provide testimony and, after that testimony and cross-examination, the court would have imposed a more lenient sentence. There is absolutely no basis for us to do so. Michael offers no suggestion what he might have said if the court had granted his request; the possibilities could range from belatedly expressing remorse to attempting to discredit the witnesses against him. Among its many reasons for imposing the sentence it did, the court particularly noted Michael's lack of remorse throughout the proceedings. The probation report indicated that Michael admitted "partial guilt," but claimed that he should not have been prosecuted due to the statute of limitations for sex crimes; that he gave no explanation for his offenses; and that he reported having been physically abused as a child. In light of the offenses he

committed and lack of remorse he displayed throughout the investigation and trial, it is impossible to imagine anything Michael could have said that would have altered the court's view of an appropriate sentence.

Similarly, while Michael complains that Billups made no effort to submit evidence or argument in mitigation, he offers no suggestion what mitigating evidence Billups might have been able to marshall. (See *People v. Lai* (2006) 138 Cal.App.4th 1227, 1256 [claim of ineffective representation based on counsel's failure to cite all relevant mitigating factors failed for lack of specificity as to which factors should have been mentioned].) The only hint of arguable mitigation in the probation report was Michael's claim that he was physically abused as a child. The trial court was aware of this information from the probation report and, in light of the offenses Michael committed, it is inconceivable that any defense attorney could have swayed the court's view of sentencing on this basis. Michael's suggestion that Billups's lack of familiarity with the trial testimony prevented him from being able to build a case in mitigation upon the testimony that Michael "cared for the children in legitimate ways—taking them on family outings, and participating in activities relating to Native American culture," defies belief.

III.

Christopher contends his conviction on count 9, continuous sexual abuse of Jane Doe 4 between May 19, 1991 and May 18, 1993, must be reversed because there was insufficient evidence that acts of substantial sexual contact occurred over a period of not less than three months as required by section 288.5, subdivision (a). The statute provides: "Any person who either resides in the same home with the minor child or has recurring access to the child, who over a period of time, not less than three months in duration, engages in three or more acts of substantial sexual conduct with a child under the age of 14 years at the time of the commission of the offense . . . is guilty of the offense of continuous sexual abuse of a child and shall be punished by imprisonment in the state prison for a term of 6, 12, or 16 years." By its plain terms, section 288.5

requires the prosecution to "prove defendant committed the minimum number of proscribed acts within the specified time period." (*People v. Mejia* (2007) 155 Cal.App.4th 86, 94.)

" ' "In reviewing the sufficiency of evidence under the due process clause of the Fourteenth Amendment to the United States Constitution, the question we ask is 'whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " [Citation.] We apply an identical standard under the California Constitution. [Citation.] "In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court 'must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.' " [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence. [Citation.]' (*People v. Young* (2005) 34 Cal.4th 1149, 1175.)

"We therefore review the record in the light most favorable to the prosecution to determine whether the challenged convictions are supported by substantial evidence, meaning 'evidence which is reasonable, credible, and of solid value.' (*People v. Johnson* (1980) 26 Cal.3d 557, 578.) In contrast, 'mere speculation cannot support a conviction. [Citations.]' (*People v. Marshall* (1997) 15 Cal.4th 1, 35.) 'In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact. [Citation.] Moreover, unless the testimony is physically impossible or inherently improbable, testimony of a single witness is sufficient to support a conviction. [Citation.]' (*People v. Young, supra,* 34 Cal.4th at p. 1181.)" (*People v. Mejia, supra,* 155 Cal.App.4th at p. 93.)

Jane Doe 4 testified that Christopher put his penis into her vagina more than once and that she was not sure but did not think it had happened more than twice. He also put his finger in her vagina on a separate occasion "far apart" or "months" from when he had sex with her. Asked how long it was between the first and second times he had sex with her, she said she was not sure and did not remember, that it was "months," and then that it was not "[m]ore than one" and she thought "it was probably like one." Jane Doe 4 also did not remember how many months there were between when Christopher put his finger in her vagina and when he had intercourse with her. Asked if it was more than one month, she said, "Probably, yes." Asked if it was more than three months, she said "no," then said "yeah" to whether it was less than three months. Counsel then reminded Jane Doe 4 that she had previously said it was "months" between the digital penetration and the intercourse and asked her if it could have been two months, and she said, "[p]robably, yeah." Counsel next asked if it "could have been over a month" between the two acts of intercourse, and Jane Doe 4 said, "I guess. I don't know. I don't really remember." Counsel asked, "But about a month?" and Jane Doe 4 replied, "Yeah."

Jane Doe 4 thus described three acts of substantial sexual contact, two acts of intercourse about one month apart, and one act of digital penetration separated in time from the intercourse by "probably" two months. Christopher mischaracterizes her testimony by describing her as having said that the time between the first and last acts of sexual contact "was probably more than one month but was less than three months and was not more than three months, and that it could probably have been two months but she did not really remember." This characterization ignores the distinction in the testimony between the time separating the two acts of intercourse from one another, and the time separating the two acts of intercourse from the digital penetration. Jane Doe 4 described three acts spanning a total time of three months. "[T]he prosecution need not prove the exact dates of the predicate sexual offenses in order to satisfy the three-month element. Rather, it must adduce sufficient evidence to support a reasonable inference that at least

three months elapsed between the first and last sexual acts." (*People v. Mejia*, *supra*, 155 Cal.App.4th at p. 97.) Jane Doe 4's testimony was sufficient to support the conviction on this count.

The judgments are affirmed.

_____
Kline, P.J.

We concur:

_____
Lambden, J.

_____
Richman, J.